Sabah Development Bank Bhd v SKBS (Sabah) Sdn Bhd & Ors

HIGH COURT (SABAH) — CIVIL SUIT NO K364 OF 1986
SYED AHMAD IDID JC
17 SEPTEMBER 1991

Banking *— Banks and banking business — Development bank — Documentary credit facility extended to first defendants — Claim by plaintiffs for summary judgment on outstanding sum — Triable issue — Whether plaintiffs licensed as a 'bank' — Whether granting of facility constituted 'banking business' — Whether transaction illegal and void — Banking Act 1973 ss 2, 3 & 9 — Contracts Act 1950 ss 2(g) & 24*

Civil Procedure *— Summary judgment — Documentary credit facility — Claim for sum outstanding — Triable issue — Whether plaintiffs licensed as a 'bank' — Whether granting of facility constituted 'banking business' — Whether transaction illegal and void — Banking Act 1973 ss 2, 3 & 9 — Contracts Act 1950 ss 2(g) & 24*

Contract *— Illegality — Documentary credit facility — Claim by development bank for outstanding sum — Whether plaintiffs licensed as a 'bank' — Whether transaction illegal and void — Banking Act 1973 ss 2, 3 & 9 — Contracts Act 1950 ss 2(g) & 24*

Words and Phrases *— 'Bank' — Banking Act 1973 ss 2 & 9*

Words and Phrases *— 'Development bank'*

Words and Phrases *— 'Banking business' — Banking Act 1973 ss 2 & 3*

The plaintiffs were set up by the Sabah State Government to provide for medium and long-term loans in Sabah to private and state enterprises. The plaintiffs applied for summary judgment against the first defendants for the sum of $188,618.09 being outstanding as at 31 January 1986 from a documentary import and revolving credit facility extended by the plaintiffs to the first defendants at the first defendants' request under two letters of offer dated 30 March 1985 and 3 April 1985 respectively, together with interest thereon at the rate of 17.5% pa. By a continuing guarantee in writing dated 2 April 1985 executed by the second and third defendants in favour of the plaintiffs, the second and third defendants guaranteed on demand to pay the plaintiffs all sums up to the limit of $500,000 in addition to such further sum for interest thereon and other charges, costs and expenses which should at any time be owing or remaining due and unpaid to the plaintiffs from the first defendants.

The defendants' only contention and triable issue raised was that the plaintiffs, not being licensed as a bank under the Banking Act 1973, had transacted illegally and therefore, the transactions were void pursuant to s 24 of the Contracts Act 1950. The plaintiffs' reply was that the loan was properly and legally extended to the first defendants and so recoverable in law. The plaintiffs operate as a development bank and since 26 July 1978 the plaintiffs had been duly

A authorized to use the word 'bank' by the Minister under s 9 of the Banking Act 1973. It was submitted that the activities of the plaintiffs in respect of the loan transaction in this action are not 'banking business' and do not therefore infringe s 3 of the Banking Act 1973 as they do not come within s 2 of that Act. Therefore, the plaintiffs do not require a banking licence under the Banking Act 1973 to extend B the said loan to the first defendants.

Held, allowing the plaintiffs' claim:

(1) Development finance institutions are specialized financial institutions. They are established to promote a higher level of investC ment in industries and agriculture. Their functions include the extension of financial assistance in the form of medium and long-term loans and the provision of guarantees for loans.

(2) Even though a corporation or a company, described and registered under the Companies Act 1965 as a bank, may have obD tained consent from or is authorized by the Minister of Finance to use the word 'bank' under s 9 of the Banking Act 1973, such an organization or so-called 'bank' is not a bank and it does not become a bank within s 2 of the Banking Act 1973.

(3) No one and nobody, corporate or otherwise can be a 'banker' who does not: (i) take current accounts, (ii) pay cheques drawn E on himself; (iii) collect cheques for his customers. The objects of the plaintiffs being, inter alia, (i) the carrying on of any and every aspect of business as a development bank and (ii) the carrying on of business as capitalists and financiers, there was no evidence that they were carrying on the business of banking.

(4) To determine whether or not the granting of the facilities constiF tutes banking business, the purpose of the facilities would have to be considered. In this case, it was clearly set out that the purpose was to facilitate the first defendants' importation of electrical and mechanical equipment and for their general working capital purpose.

G (5) As there was no evidence before the court that Bank Negara or other regulatory authority had disapproved of the plaintiffs' activities, the court presumed that the plaintiffs conduct their business in accordance with the laws and regulations of Malaysia, and therefore they have not breached the Banking Act 1973 (or The Banking and Financial Institutions Act 1989 where applicable).

H (6) On the evidence and arguments on the points of contention, the court could not see how the plaintiffs had breached the law as they did not conduct banking business by lending to the defendants.

I **[Bahasa Malaysia summary**

Plaintif telah ditubuhkan oleh kerajaan negeri Sabah untuk memberikan pinjaman jangka pertengahan dan panjang di Sabah kepada perusahaan persendirian dan negeri. Plaintif telah memohon untuk penghakiman

terus terhadap defendan pertama untuk jumlah $188,618.09, iaitu jumlah yang belum dijelaskan pada 31 Januari 1986 daripada satu kemudahan dokumentari import dan kredit berkisar (revolving credit) yang diberikan oleh plaintif kepada defendan pertama, berikutan daripada permohonan defendan pertama, di bawah dua surat tawaran bertarikh 30 Mac 1985 dan 3 April 1985 masing-masing, bersama dengan faedah di atasnya pada kadar 17.5% setahun. Melalui satu jaminan berterusan dalam tulisan bertarikh 2 April 1985 yang dilaksanakan oleh defendan kedua dan ketiga bagi faedah plaintif, defendan kedua dan ketiga menjamin apabila dituntut untuk membayar plaintif semua jumlah setakat $500,000 bersama dengan jumlah tambahan untuk faedah di atasnya dan caj, kos dan perbelanjaan lain yang pada bila-bila masa terhutang atau kena dibayar dan tidak dibayar kepada plaintif oleh defendan pertama.

Hujah tunggal defendan dan isu yang boleh dibicarakan yang ditimbulkan adalah bahawa plaintif, yang bukan dilesenkan sebagai sebuah bank di bawah Akta Bank 1973, telah membuat transaksi itu secara tidak sah dan lantaran itu, transaksi itu terbatal mengikut s 24 Akta Kontrak 1950. Jawapan plaintif adalah bahawa pinjaman itu telah diberikan secara teratur dan sah di sisi undang-undang kepada defendan pertama dan oleh itu boleh dituntut kembali menurut undang-undang. Plaintif berurus sebagai sebuah bank pembangunan dan sejak 26 Julai 1978 plaintif telah diberikan kebenaran menggunakan perkataan 'bank' oleh Menteri di bawah s 9 Akta Bank 1973. Telah dihujahkan bahawa aktiviti plaintif berkenaan dengan transaksi pinjaman di dalam tindakan ini bukan 'banking business' dan tidak menyalahi s 3 Akta Bank 1973 kerana aktiviti itu tidak termasuk di dalam lingkungan s 2 Akta itu. Jadi, plaintif tidak memerlukan satu lesen bank di bawah Akta Bank 1973 untuk memberikan pinjaman tersebut kepada defendan pertama.

Diputuskan, membenarkan tuntutan plaintif itu:

(1) Institusi kewangan pembangunan adalah institusi kewangan yang khas. Mereka telah ditubuhkan untuk menggalakkan pelaburan di dalam industri dan pertanian. Fungsi mereka meliputi pemberian bantuan kewangan dalam bentuk pinjaman jangka pertengahan dan panjang dan pemberian jaminan untuk pinjaman.

(2) Walaupun suatu korporasi atau syarikat, yang dihuraikan dan didaftar di bawah Akta Syarikat 1965 sebagai sebuah bank, mungkin telah memperolehi persetujuan daripada atau dibenarkan oleh Menteri Kewangan untuk menggunakan perkataan 'bank' di bawah s 9 Akta Bank 1973, organisasi sedemikian atau 'bank' yang didakwa itu bukan sebuah bank dan ia tidak menjadi sebuah bank mengikut s 2 Akta Bank 1973.

(3) Tiada sesiapa, korporasi atau tidak, boleh menjadi seorang 'banker' jika ia tidak: (i) menerima akaun semasa, (ii) membayar cek yang dikeluarkan atas dirinya, (iii) memungut cek bagi pelanggannya. Objek plaintif adalah, antara lainnya, (i) penjalanan sebarang dan semua aspek perniagaan sebagai sebuah bank pembangunan dan (ii) penjalanan perniagaan sebagai kapitalis dan pembiaya. Jadi

tidak terdapat keterangan bahawa mereka telah menjalankan perniagaan bank.

(4) Untuk menentukan sama ada atau tidak pemberian kemudahan merupakan perniagaan bank, tujuan kemudahan itu mesti dikaji. Dalam kes ini, memang telah diperuntukkan dengan jelas bahawa tujuannya ialah untuk membantu defendan pertama mengimport alat elektrikal dan mekanikal dan untuk tujuan modal urusniaga am (general working capital).

(5) Oleh kerana tidak ada keterangan di depan mahkamah bahawa Bank Negara atau pihak berkuasa lain telah membangkang aktiviti plaintif, mahkamah menganggap bahawa plaintif menjalankan perniagaan mereka mengikut undang-undang dan peraturan Malaysia, dan oleh it mereka tidak menyalahi Akta Bank 1973 (atau Akta Bank dan Institusi Kewangan 1989 di mana bersangkutan).

(6) Mengikut keterangan dan hujah atas isu yang dipertikaikan, mahkamah tidak dapat melihat bagaimana plaintif telah melanggar undang-undang oleh kerana mereka tidak menjalankan perniagaan bank dalam memberikan pinjaman kepada defendan.]

Notes

For cases on the meaning of 'banking business', see 1 *Mallal's Digest* (4th Ed) paras 841, 864. For cases on triable issues in summary judgments, see 2 *Mallal's Digest* (4th Ed) paras 2287–2293.

Cases referred to

1 *Re Haji Yahya Lampang; ex p Sabah Development Bank Bhd* [1987] 2 MLJ 488 (refd)
2 *Bank of China v Lee Kee Pin* [1961] MLJ 40 (refd)
3 *Bank of China v Chew Kean Kor* [1963] MLJ 41 (refd)
4 *Vernes Asia Ltd v Trendale Investment Ltd & Anor* [1988] 1 MLJ 357 (folld)
5 *Roe's Legal Charge; Park Street Securities v Roe (Albert William)* [1982] 2 Lloyd's Rep 370 (refd)
6 *Diversey (Far East) Pte Ltd v Serba Pakar Kimia Sdn Bhd* Application for Execution No K22 of 1991 (unreported) (refd)

Legislation referred to

Banking Act 1973 ss 2, 3, 9
Companies Act 1965
Contracts Act 1950 ss 2(g), 24
Finance Companies Act 1969 s 3
Moneylenders Ordinance 1951
Banking Act (Cap 19, 1985 Ed) [Sing]

Lawrence Thien (*Chau & Thien*) for the plaintiffs.
Sugumar Balakrishnan (*Sugumar & Co*) for the defendants.

Syed Ahmad Idid JC: The plaintiffs are a company incorporated in Malaysia and have their place of business at Wisma Tun Fuad Stephens, Lot No 3, SDB Tower, Karamunsing, Kota Kinabalu, Sabah. *Money and*

Banking in Malaysia by Bank Negara Malaysia (30th Anniversary Ed, 1959–1989) has this to say: A

> In 1977, the Sabah Development Bank Bhd was set up by the Sabah State Government to provide for medium and long-term loans in Sabah to private and state enterprises. By the 1980's, the Agricultural Bank of Malaysia followed by the Sabah Development Bank [the plaintiffs] emerged as the leading medium and long-term credit institutions while loans by the Sabah Development Bank Bhd were extended to finance a wide range of activities on the agriculture, manufacturing, utilities and the construction of real estate sectors. B

The plaintiffs claimed against the first defendants for the sum of $188,618.09 being outstanding as at 31 January 1986 from a documentary import and revolving credit facility extended by the plaintiffs to the first defendants at the first defendants' request under two letters of offer dated 30 March 1985 and 3 April 1985 respectively, together with interest thereon at the rate of 17.5% pa. C

By a continuing guarantee in writing dated 2 April 1985 executed by the second and third defendants in favour of the plaintiffs, the second and third defendants guaranteed on demand to pay the plaintiffs all sums up to the limit of $500,000 in addition to such further sum for interest thereon and other charges, costs and expenses which should at any time be owing or remaining due and unpaid to the plaintiffs from the first defendants. D

The plaintiffs also claimed against the first, second and third defendants statutory interest, costs and further or other relief. E

At the hearing on 4 July 1991, Mr Sugumar, on behalf of the three defendants, decided to argue only on one point, ie that the plaintiffs, not being licensed as a bank under the Banking Act 1973, had therefore transacted illegally. So the issue he raised was that the transactions,the subject matter of this action, were void pursuant to s 24 of the Contracts Act 1950. What Mr Sugumar meant was that 'the agreement(s) [was/were] not enforceable by law' (s 2(g) of the Contracts Act 1950). He submitted that the object of the agreement was forbidden by law — s 24(a) Contracts Act 1950. F

The plaintiffs' contention was that the loan was properly and legally extended to the first defendants and so recoverable in law. The plaintiffs operate as a development bank and since 26 July 1978, the plaintiffs had been duly authorized to use the word 'bank' by the Minister under s 9 of the Banking Act 1973. The activities of the plaintiffs in respect of the loan transaction in this action are not 'banking business' and do not therefore infringe s 3 of the Banking Act 1973 as they do not come within s 2 of that Act. Therefore the plaintiffs do not require a banking licence under the Banking Act 1973 to extend the said loan to the first defendants. G H

What is a development bank or development finance institution?

According to the Bank Negara Malaysia's 30th anniversary edition of *Money and Banking in Malaysia (1959–1989)*, development finance institutions are specialized financial institutions. They are established to promote a higher level of investment in industries and agriculture. Their functions include the extension of financial assistance in the form of medium and I

long-term loans and the provision of guarantees for loans. The role played by development finance institution tends normally to complement those of other major financial institutions. They specialize in medium and long-term capital financing as well as supply a range of financial services not normally provided by the commercial banks and the finance companies. Development finance institutions emerged in Malaysia, as in most developing countries, to fill a gap in the supply of financial services that are not usually covered by the established financial institutions. A significant problem faced by the development finance institutions in Malaysia has been the increasing competition posed by other financial institutions, which are becoming more development-oriented in outlook.

Cited in support by the plaintiffs was the judgment of *Re Haji Yahya Lampang, ex p Sabah Development Bank Bhd.*[1] That was a bankruptcy petition with the plaintiffs as the judgment creditors. In that case, it was claimed (at p 491) that 'the action of the judgment creditor was to recover the money due to them and this could not be called transacting banking business' as defined. Also cited were *Bank of China v Lee Kee Pin*[2] and *Bank of China v Chew Kean Kor.*[3] The learned judge in *Re Haji Yahya Lampang*[1] said [at p 491] after listening to the arguments and considering the evidence and the authorities, that he was 'satisfied' and that he 'accepted the affidavit of the general manager of the petitioning creditors that [their] activities *in respect of this transaction* (emphasis added) neither infringed s 3 of the Banking Act as they do not come within s 2 of that Act nor did they contravene s 3 of the Finance Companies Act 1969, since their activities do not come within s 2 thereof'.

I proposed not to go into whether or not the transaction(s) infringed the Moneylenders Ordinance 1951 on two grounds: (1) this was not contested; and (2) I accepted the plaintiffs' statement that it was exempted by gazette notification PU(B)176 of 1986 from the provisions of the said ordinance with retrospective effect from 9 August 1977. The plaintiffs did not, however, delve deeply into the 'banking business', what it embodied and its implications, and counsel neglected to discuss whether the plaintiffs can conduct 'banking business' and its relevance to the present action.

My finding at this stage is that even though a corporation or a company so described and registered under the Companies Act 1965, may have obtained consent from or is authorized by the Minister of Finance under s 9 of the Banking Act 1973, such an organization or so-called 'bank' is *not* a bank and it does not become a bank within s 2 of the Banking Act 1973. I have to deal with the Banking Act 1973 which was applicable at the time the loan(s) was/were made and became repayable. Section 9 dealt with restrictions of the use of the title 'bank' and the use of certain words in a bank's name, and it clearly spelt out that

> a person or body of persons not being a licensed bank shall not assume or use in relation to the business or any part of the business carried on by the person or body of persons the word 'bank' or any of its derivative or any word indicating the carrying on of banking business either in National Language or in English or in any other language (except with the consent in writing of the Minister).

The prohibition was against the use of the word 'bank'.

The plaintiffs tendered exh TSH-1 where on on 26 July 1978, the Minister of Finance gave consent to the plaintiffs to use the word 'bank' in their name. Exhibit TSH-2 is a copy of the form of certificate of incorporation of public company dated 9 August 1977 together with the memorandum of association. Among the objects of the plaintiffs are: (i) to carry on any and every aspect of business of a development bank; (ii) to carry on business as capitalists and financiers.

The plaintiffs' counsel cited *Vernes Asia Ltd v Trendale Investment Pte Ltd & Anor*[4] where the Singapore Banking Act [Cap 19, 1985 Ed] was raised. In that case the plaintiffs were a deposit-taking company incorporated in Hong Kong and had no office or place of business in Singapore. It was held [at pp 361–362]:

> 'banking business' in s 2 of the Banking Act [Cap 19, 1985 Ed] means that a company can only be said to be conducting banking business if it performs all of the functions of receiving money on current or deposit account; paying and collecting cheques; making advances; and such other business as may be prescribed by the Monetary Authority of Singapore for the purposes of the Act. ... the legislature did not intend the definition of 'banking business' in the Banking Act to be construed disjunctively so that the making of advances to customers alone amounts to the conduct of banking business. ... [Therefore], the plaintiff was not conducting banking business in Singapore ...

In that case, it was not suggested on behalf of the defendants that the loan by the plaintiffs to the first defendant in any way offended the provisions of the Deposit-taking Companies Ordinance (see p 359). In our instant case, there was a challenge to the legality of the loan(s) and it has been suggested that the loan(s) offended against the Banking Act 1973. *Paget's Law of Banking* (6th Ed) at p 8 states that 'No one and nobody, corporate or otherwise can be a "banker" who does not: (i) take current accounts; (ii) pay cheques drawn on himself; (iii) collect cheques for his customers'.

In *Roe's Legal Charge; Park Street Securities v Roe (Albert William)*,[5] the trial judge held that the plaintiffs were carrying on the business of banking because the evidence showed they were doing all three of these acts. In our case, there was no evidence that the plaintiffs did any of the above. The evidence only showed the plaintiffs made advances (one such was to the defendants — facility 1) and provided documentary import credit facility of $300,000, and revolving credit line of $200,000 (facility 2) for the issuance of letters of credit and import advance or trust receipt. Facility 1 was provided for the issuance of documentary sight/time letter of credit ('LC') within limit of 30 days import advance ('IA'), and up to 60 days trust receipt ('TR'). Facility 2 — drawdown supported by promissory notes.

Mr Sugumar said that letters of credit and trust receipts are peculiar to banks only. 'Only commercial banks licensed under the relevant Acts carry on this particular kind of facilities.' The guarantee document stated that plaintiffs did grant 'banking facilities'. Even though the M & A of the plaintiffs may state several activities they can embark upon, the court can find against them if they carried out banking business, ie take current accounts and pay and/or collect cheques.

One must also go back to the basics and the basic factor which would determine whether or not the granting of the facilities constitutes banking

business is the purpose of the facilities — at p 2 cl 3 of exh LCF-1, it was clearly set out that the purpose was to facilitate SKBS's (ie the first defendants') importation of electrical and mechanical equipment and for SKBS's general working capital purposes.

The defendants said it was a triable issue: the question of whether the loan was void in view of the fact that the plaintiffs are not licensed as a bank under the Banking Act 1973 (now the Banking and Financial Institutions Act 1989).

The plaintiffs contended that the loan could be under 'provision of finance' and under the Banking Act it would be under 'making advances'. As for the issuance of letters of credit and trust receipts, Mr Thien agreed that this may be peculiar to banks but there is no prohibition in law and such issuance is not the sole domain of the commercial banks.

Bank Negara Malaysia is the authority on banks and who can carry on banking business. In the book *Money and Banking in Malaysia 1989*, the plaintiffs were described as follows:

> The authorized capital initially was $100m, but was subsequently raised to $200m in 1982. The priority areas for financing included Bumiputera enterprises, agro-based and wood-based industries, and housing development. Since 1979, the bank had expanded its activities to cover both large-scale project financing and co-financing as well as trade financing, loans syndication and corporate finance and management services. The bank's activities were later expanded to leasing, hire purchase and mortgage finance. (It went) into retail banking after taking a minority shareholding interest in Sabah Bank Bhd in 1986. Prior to 1982, these loans were granted for the financing of manufacturing activities, especially of wood and wood products, metal and metal products, and transport equipment. But, after 1982, the emphasis was more on lending to the property development and real estate sector. In 1987, 37.5% of the loans outstanding was for property development and real estate, and 29% for agriculture. A smaller share of 5.3% was extended to the manufacturing sector, and another 3% to general commerce. In terms of maturity, 61.8% of the outstanding loans was extended in the form of loans of over five years maturity, while short-term loans of less than three years accounted for another 37.6% and medium-term loans with a maturity of three to five years accounted for the remaining 0.6%. The interest rates charged varied according to the nature of loans, but a discernible decline in the mode rates was observed for most types of loans during 1987. During the year, the mode lending rates for construction and real estate development declined to 11.5%, agriculture to 11%, and manufacturing to 10.5% pa. Besides providing development finance, the bank was also engaged in the provision of fee-based services. This included loans syndication, corporate finance, and management advisory services for private and public enterprises in the state. Between 1979 and 1987, the bank led and co-led a total of 36 syndicated loans, with a cumulative value of $1,100.5m. Its share was $173.3m or 15.7%.

Order 14

The defendants strongly claimed that by virtue of the transaction or loan being challenged as void, summary judgment should not be ordered. In reply, the plaintiffs quoted *Diversey (Far East) Pte Ltd v Serba Pakar Kimia Bhd*[6] where the court confirmed that it 'cannot see any triable issue at all

among the many issues raised ... the court does not like to see any abuse of the process of the court'. But to be fair to the defendants, the court in the same action also stated that '[n]either, of course, should courts order summary judgment if one is not merited'.

The facilities were extended on 31 January 1986 on the two letters of offer dated 30 March 1985 and 3 April 1985. The promissory notes were dated 1 October 1984, 16 November 1984 and 3 April 1985. The continuing guarantee was dated 2 April 1985. All these transactions and activities were regulated by the Banking Act 1973 during the period in question. The Banking and Financial Institutions Act 1989 ('BAFIA') only came into force as from 1 October 1989. Financial institutions, according to *Money and Banking in Malaysia*, Bank Negara Malaysia (1959–79) at p 204 include 'the banks, the finance companies and institutions such as the MIDF and Sabah Development Bank'.

The part where the plaintiffs involved themselves in letters of credit or trust receipts disturbed me in that such transactions involve foreign exchange which each bank (or organization) must clear with Bank Negara Malaysia. It would appear that the plaintiffs are a scheduled institution (s 2(1) of BAFIA) as it carries out scheduled business of development finance business. (See s 3 of BAFIA's third schedule.) In the absence of any evidence that Bank Negara or other regulatory authority has disapproved of the plaintiffs' activities, I shall presume that the plaintiffs conduct their business in accordance with the laws and regulations of Malaysia and therefore they have not breached the Banking Act 1973 (or the Banking and Financial Institutions Act 1989 where applicable).

The activities of licensed institutions and other corporations can be regulated by Bank Negara, eg deposit-taking restrictions imposed on finance companies and merchant banks have been reduced substantially recently. This is merely to illustrate that the activities of those bodies under the Banking Act 1973 or BAFIA can change from time to time.

In line with the evidence and the arguments on the points of contention, I cannot see how the plaintiffs have breached the law as they did not conduct banking business by lending to the defendants. *Vernes Asia Ltd*[4] is clearly in support of this. Accordingly, I grant an order-in-terms of the plaintiffs' claims and I order accordingly.

Claim allowed.

Reported by Neoh Lay Choo